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A DECADE OF PROGRESS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT

WILLIAM H. DePARCQ*

The last decade has witnessed an almost unbroken series of decisions by the United States Supreme Court¹ consistently enlarging the role of the jury, in actions under the FELA, in deciding fact issues, particularly relating to negligence and causation. The scope of jury decision has been so expanded as to make the occasion for a directed verdict rare and exceptional—perilous business for the trial court. Paralleling this trend to accord supremacy to the jury's function, has been the development of agitation and advocacy for the adoption of a system of workmen's compensation to supplant the FELA. Formerly both management and labor in the railroad industry were generally in favor of retaining the jury-court system and united in opposition to the principle of workmen's compensation, but as the province of the jury has been enlarged, many of the carriers have reversed their position.

In 1949 the House of Delegates of the American Bar Association voted to support replacement of the FELA with systems of workmen's compensation, by recommending that Congress place railroad workers under the compensation laws of the various states.² The Railroad Retirement Board had two years before supported a similar shift from employers' liability to a compensation system.³ Other

* LL.B. 1930, St. Paul College of Law; Member of Illinois and Minnesota bars with offices in Chicago and Minneapolis; Member, House of Representatives, Minnesota Legislature, 1932-1934; Member of Minnesota Judicial Council 1937-1939; presently Chairman, Court Rules Committee, Minnesota State Bar Association.

¹ *Lilly v. Grand Trunk Western R. R.*, 317 U. S. 481 (1943); *Tiller v. Atlantic Coast Line R. R.*, (first appeal) 318 U. S. 54 (1943), (second appeal) 323 U. S. 574 (1945); *Bailey v. Central Vermont Ry.*, 319 U. S. 350 (1943); *Tennant v. Peoria & P. U. Ry.*, 321 U. S. 29 (1944); *Blair v. Baltimore & Ohio R. R.*, 323 U. S. 600 (1945); *Lavender v. Kurn*, 327 U. S. 645 (1946); *Jesionowski v. Boston & M. R. R.*, 329 U. S. 452 (1947); *Ellis v. Union Pacific R. R.*, 329 U. S. 649 (1947); *Myers v. Reading Co.*, 331 U. S. 477 (1947); *Lillie v. Thompson*, 332 U. S. 459 (1947); *Anderson v. Atchison, T. & S. F. Ry.*, 333 U. S. 821 (1948); *Coray v. Southern Pacific Co.*, 335 U. S. 520 (1949); *Wilkerson v. McCarthy*, 336 U. S. 53 (1949); *Urie v. Thompson*, 337 U. S. 163 (1949); *O'Donnell v. Elgin, J. & E. Ry.*, 338 U. S. 384 (1949); *Carter v. Atlanta & St. Andrews Bay Ry.*, 338 U. S. 430 (1949); *Affolder v. New York, C. & St. L. R. R.*, 339 U. S. 96 (1950); *Dice v. Akron, Canton & Youngstown R. R.*, 342 U. S. 359 (1952).

Exceptions: *Brady v. Southern Ry.*, 320 U. S. 476 (1943); *Eckenrode v. Pennsylvania R. R.*, 335 U. S. 329 (1948); *Moore v. Chesapeake & O. Ry.*, 340 U. S. 573 (1951).

² 74 A. B. A. REP. 108 (1949).

³ UNITED STATES RAILROAD RETIREMENT BOARD, WORK INJURIES IN THE RAILROAD INDUSTRY, 1938-1940 6-19 (1947).

studies, not at all definitive, of the relative costs and the relative merits of justice administered by the court and jury under the FELA as compared to justice administered by boards and commissions under the principle of workmen's compensation have been made.⁴ The litigious method was described by Mr. Justice Douglas as "crude, archaic, and expensive" in the *Bailey* case;⁵ by Mr. Justice Frankfurter as "cruel and wasteful" in the concurring opinion in the *Wilkerson* case;⁶ and by Mr. Justice Jackson as "medieval" and "backward" in his concurring opinion in the *Miles* case.⁷ Are these strictures justified? The employees affected, in so far as they can be articulate through their Brotherhood organizations, do not think so. The labor organizations representing the employees oppose the application of workmen's compensation to the railroad industry because of its niggardly and inadequate awards—awards that are so low as to be shockingly futile to serve a useful or practical social purpose under modern conditions. Nor are these judicial criticisms justified by the Conard report published in the *American Bar Association Journal* (December, 1952) which found the Illinois compensation system more onerous expensewise than employers' liability litigation in that state.⁸

Lawyers who frequently represent injured railroad workers are prominent in the National Association of Claimants' Compensation Attorneys, known as NACCA, and those representing the railroads find little difficulty in expressing their views and interests through the American Bar Association. They reflect the interests which they represent, and vote as their parsnips are buttered. These conflicting views and interests are coming into increasingly sharp focus; they will receive the attention of Congress in the immediate future; and they make an appraisal of the trends and developments that have inspired these antagonistic attitudes and opposing interests timely and appropriate.

Prior to 1939 the determination of whether the particular employee injured or killed was employed in interstate commerce so as to bring the case under the FELA, was a troublesome one. It resulted in a considerable volume of perfectly absurd and futile litigation. The Act itself merely required that the employer and employee be engaged in interstate commerce, but an atavistic court, bogged down in scholasticism and tradition, read into the Act the word "transportation."

In the *Pedersen* case⁹ the criterion was whether the work of the employee at the time of injury was a part of the interstate commerce in which the carrier was engaged or so closely connected therewith as to be a part of it. Here the emphasis was on the word "commerce" as used in the statute. Later in the *Shanks* case¹⁰ the test became more restrictive so that coverage depended upon whether the employee

* Conard, *Workmen's Compensation: Is It More Efficient than Employer's Liability?*, 38 A. B. A. J. 1011 (1952); ALFRED F. CONARD AND ROBERT I. NEHR, *COSTS OF ADMINISTERING REPARATION FOR WORK INJURIES IN ILLINOIS* (GRADUATE COLLEGE, UNIVERSITY OF ILLINOIS, 1952).

⁴ *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 354 (1943).

⁵ *Wilkerson v. McCarthy*, 336 U. S. 53, 65 (1949).

⁶ *Miles v. Illinois Cent. R. R.*, 315 U. S. 698, 707 (1942).

⁸ See note 4, *supra*.

⁹ *Pedersen v. Delaware, L. & W. R. R.*, 229 U. S. 146 (1913).

¹⁰ *Shanks v. Delaware, L. & W. R. R.*, 239 U. S. 556, 558 (1916).

at the time of injury was "engaged in interstate transportation or in work so closely related to it as to be practically a part of it." The artificial distinction between commerce and transportation resulted in an intolerable situation.

In 1939 Congress enlarged the test of interstate commerce¹¹ so that the Act now applies to any employee "any part of whose duties" shall be the furtherance of interstate commerce, "or shall, in any way directly or closely and substantially, affect such commerce." It would seem that Congress intended to exercise all the power it possessed on the subject. One might suppose that if the janitor of a sawmill is now subject to federal regulations with respect to wages, hours, and conditions of employment because engaged in the production of goods for commerce, there is no reason why a janitor in a Santa Fe depot should not be regarded similarly.

The majority of the courts have had no difficulty in carrying out the mandate of Congress which was thus plainly stated and which was further explained in the report of the Senate Judiciary Committee.¹² It is clear enough that Congress intended to abolish the pin-point rule so that whether the employee is engaged in intra or interstate activities at the moment of the accident is immaterial. However, some courts are still possessed of the notion that the activities at the time of injury are determinative.¹³

All courts are agreed that Congress has stated a new and a much broader test of what should be considered interstate commerce not only by extending the protection of the Act to employees, any part of whose duties further interstate commerce, but also by the sweeping and significant language applying the Act to employees whose duties "shall, in any way directly or closely and substantially, affect such commerce."

Although some courts have managed to make a problem of this broad language, the majority have reacted in accordance with the congressional intent to exercise full supervision over the railroad industry where constitutionally permissible, and so the following employees have received the protection of the Act:

A repairman working in the backshop on locomotives and their various parts which had been withdrawn from service for major overhauls and repairs;¹⁴ a tie inspector who went to the premises of a lumber company to inspect ties and determine whether his employing railroad would buy them and use them later in an interstate road bed;¹⁵ an employee loading barrels of oil to be used in filling rail-

¹¹ 53 STAT. 1404 (1939), 45 U. S. C. §51 (1946).

¹² AMENDING THE EMPLOYERS' LIABILITY ACT, SEN. REP. NO. 661, 76th Cong., 1st Sess. 2 (1939): "This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations."

¹³ *Walden v. Chicago & N. W. Ry.*, 411 Ill. 378, 104 N. E. 2d 240 (1952) would appear to be a legal oddity for there the court held that an employee does not come under the Act unless his duties and activities at the time of the accident affect interstate "transportation" and that the criterion is still the work at which the employee is engaged at the time of his injury!

¹⁴ *Baird v. New York Cent. R. R.*, 299 N. Y. 213, 86 N. E. 2d 567 (1949).

¹⁵ *Ericksen v. Southern Pacific Co.*, 246 P. 2d 642 (Cal. 1952).

road lanterns and machines;¹⁶ a blacksmith's helper engaged in making locomotive parts;¹⁷ a guard at a terminal;¹⁸ an employee whose duty it was to clean up papers and other debris around the depot and the railroad tracks;¹⁹ a flood control worker whose duty it was to fill sand bags and place them on a flat car which took them to where they were needed to protect the tracks from existing flood waters;²⁰ a laborer around certain ore docks, who served as a guard during the months of October to May when they were not in use or service of any kind, although they were used for interstate commerce from May to October;²¹ and a rodman, who was a member of a surveying crew and who spent about 50 per cent of his time in interstate operations even though he was at the time of the accident engaged solely in intrastate work.²² Suffice it to say that it is presently unnecessary that the employee's duties be related to interstate commerce on the particular day or at the particular time of his injury.²³

The question of coverage is no longer a serious one for the practitioner in this field. Except in the minority of courts afflicted with myopia in its last stages, he is safe in assuming that Congress did two things by the 1939 amendment: first, it abolished the requirement of proof that at the instant of injury the worker must be engaged in interstate commerce or work practically a part of it; and second, it broadened the whole concept of interstate commerce as covered by the FELA.

THE FUNCTION OF THE JURY

The Seventh Amendment to the Constitution of the United States guarantees a jury trial in the federal courts²⁴ in suits at common law where the value in controversy exceeds twenty dollars. In one form or another all state constitutions, except that of Louisiana, likewise guarantee a jury trial of fact issues in actions at common law. This sacred and fundamental right has universally been regarded by jurists, statesmen, scholars, orators, historians, and all who have given the subject any thought, as a most precious part of the American heritage; many believe it to be the keystone of our way of life. It is one of the most essential rights of free men everywhere, the palladium of individual liberty and the bulwark of individual freedom. Men have justifiably sacrificed their life's blood and treasure all over the world to defend and preserve this institution.

It is disconcerting to discover that until the last decade this valuable and sacred right was frequently disregarded in FELA cases by the jurists who constituted the highest court in the land. The resounding phrases and glorified rhetoric must

¹⁶ *Harris v. Missouri Pacific R. R.*, 158 Kan. 679, 149 P. 2d 342 (1944).

¹⁷ *Trucco v. Erie R. R.*, 353 Pa. 320, 45 A.2d 20 (1946).

¹⁸ *Albright v. Pennsylvania R. R.*, 183 Md. 421, 37 A. 2d 870 (1944).

¹⁹ *Piggy v. Baldwin*, 154 Kan. 707, 121 P. 2d 183 (1942).

²⁰ *Shanks v. Union Pacific R. R.*, 155 Kan. 584, 127 P. 2d 431 (1942).

²¹ *Great Northern Ry. v. Industrial Comm'n*, 245 Wis. 375, 14 N. W. 2d 152 (1944).

²² *St. Louis-S. F. Ry. v. Wacaster*, 210 Ark. 1080, 199 S. W. 2d 948 (1947).

²³ *Ford v. Louisville & N. R. R.*, 355 Mo. 362, 196 S. W. 2d 163 (1946).

²⁴ *Minneapolis & St. Louis R. R. v. Bombolis*, 241 U. S. 211 (1916); see also *Dice v. Akron, C. & Y. R. R.*, 342 U. S. 359 (1952).

have seemed as sound and fury to Mrs. Coogan²⁵ who, although her deceased husband was found in close proximity to a bent and defective pipe with a depression in his shoe that might have been made by it, was told that jurors must not enter into the field of speculation and conjecture; and to Mrs. Chamberlain²⁶ who discovered that their Honors did not share the belief of her jury in the testimony of witness Bainbridge that the "extra loud crash" indicated a collision since three company employees denied there was any collision and, therefore, the observed facts gave equal support to each of two inconsistent inferences, sustaining neither; and to Mrs. Toops²⁷ who lost her verdict and judgment below because, although her husband was run over and his body severed by cars being kicked at night without a light on the leading end or an employee to give warning, at a place where the roadbed was overgrown with weeds and where the tracks were so thinly ballasted as to be skeletonized, proof of negligence alone was not enough, causal connection still being in the realm of surmise rather than what the court considered the "realm of probability"; and to Mrs. Ambrose²⁸ whose recovery in the courts below was set aside because, although her husband was employed to sweep the floor around a bin containing gas of a most dangerous character, and although his body was found at the bottom of the pit, a half dozen things might have brought about the injury, for only some of which the employer was responsible and it was not for the jury to guess among these half dozen causes; and to Allen²⁹ who lost his victory below (as well as his leg) when he was struck by cars shunted unlighted and unattended, without warning, while working as a checker, and whose jury verdict was set aside because carriers must have much freedom of choice in providing facilities and places, and to ring a bell or blow a whistle would only have confused him.

The incredible decisions heretofore discussed were by a unanimous Court. In other early FELA cases a jury trial was denied with little more than a variation of the legal jargon that inference must not be piled upon inference, nor presumption upon presumption. In later years, however, the Court appeared to have lost its diplomatic touch in this field and so we find a bold majority of the court setting aside jury verdicts for the naked reason that reasonable men could come to but one conclusion, thereby openly recording their dissenting brethren as unreasonable men.³⁰ Fortunately, these usurpations of the jury function have in the last decade been largely relegated to a museum of legal curiosities.

The new dispensation of the last decade is based primarily upon the philosophy that jurors, although ordinary citizens, sans robes, might be qualified to exercise common sense, demonstrate practical wisdom, and even dispense justice in the ordinary affairs of life. It has revitalized the jury function. It recognizes the power

²⁵ Chicago, M. & St. P. Ry. v. Coogan, 271 U. S. 472 (1926).

²⁶ Pennsylvania R. R. v. Chamberlain, 288 U. S. 333 (1933).

²⁷ Atchison, T. & S. F. Ry. v. Toops, 281 U. S. 351 (1930).

²⁸ New York Central R. R. v. Ambrose, 280 U. S. 486 (1930).

²⁹ Toledo, St. L. & W. R. R. v. Allen, 276 U. S. 165 (1928).

³⁰ Moore v. Chesapeake & O. Ry., 340 U. S. 573 (1951); Wilkerson v. McCarthy, 336 U. S. 53 (1949).

of the jury within its province permissibly to be right or wrong; no superior wisdom is pre-supposed to lie in the court. The new liberalism gives practical application, rather than mere lip service, to the doctrine that the jury (and not the court) is the fact-finding body and has something more than an advisory province.

Mrs. Bailey's³¹ husband was thrown from his narrow footing on an open bridge to the ground below, the wrench he was using having spun unexpectedly when the door on a hopper car released; she was awarded a jury trial in 1943 because it is "a basic and fundamental feature of our system of federal jurisprudence." The Court held that jury decision was "part and parcel of the remedy afforded railroad workers" and since it was the appropriate tribunal to determine negligence and causation, "to deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

Mrs. Tiller's³² husband was killed under circumstances very similar to those disclosed in the *Allen* case. Tiller, a railroad policeman, was standing between two tracks when trains were moving on both of them; the night was dark and the yard unlighted and while using a flashlight to inspect seals he was struck by the unlighted train on the track behind him. It took years of litigation, including two trips to the Supreme Court, to vindicate her right to a jury trial but it was sustained ultimately because as long as the jury system is the law of the land, it should be made the tribunal to decide disputed questions of fact, such as negligence and causation. A jury could have found that the diffused rays of a strong headlight, even though directed into the cars ahead of it, might have spread themselves so as to give warning of the movement.

It was the *Tiller* case which condemned nice distinctions between contributory negligence and assumption of risk and held that the 1939 amendment by Congress had obliterated "every vestige of the doctrine" of assumed risk and had swept into the discard the "maze of law" which had arisen from the primary-duty rule, the simple-tool, peremptory-order, and promise-to-repair doctrines. The Court expressed determination not to permit assumption of risk to be revived under the guise of contributory negligence or the defense of non-negligence.

Tennant³³ was last seen alive placing his raincoat in a clothes compartment beneath the cab window of a standing engine at night. He walked around to the north or rear end of the engine and disappeared. The engine pulled a cut of cars out on the track; Tennant was then missed; and blood and portions of his body were found near the place where the engine was stationary when he was last seen alive. On conflicting evidence the case was submitted to the jury under a company rule that the engine bell must be rung when it was about to move. The court of appeals having deprived the widow of her jury verdict, the Supreme

³¹ *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 354 (1943).

³² *Tiller v. Atlantic Coast Line R. R.* (first appeal) 318 U. S. 54, 58, 64 (1943); (second appeal) 323 U. S. 574 (1945).

³³ *Tennant v. Peoria & P. U. Ry.*, 321 U. S. 29 (1944).

Court restored it, holding in effect that a jury might find the bell would not have confused Mr. Tennant. The engine had remained stationary for several minutes after Tennant disappeared and when the engineer started it in motion he was unaware of Tennant's whereabouts. Tennant might have seated himself on the footboard of the engine and fallen asleep; or he might have walked unnoticed to a point south of the engine and been killed climbing through the cars; or he might have been standing on the track north of the engine where the bell might well have saved his life. It was for the jury, aided by the presumption of due care on the part of the deceased, to accept or reject "these and other possibilities suggested by diligent counsel," all of which suffered the same lack of direct proof as characterized the one adopted by the jury. The Court advanced and strengthened the prerogative of the jury as expressed in the *Tiller* and *Bailey* cases.³⁴

It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. . . . That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

In *Lavender v. Kurn*³⁵ the deceased Haney was a switch tender. On a dark night he threw a switch to allow a passenger train to back into the station. He was found north of the track near the switch, unconscious and with a fractured skull. There was a gash on the back of Haney's head, and a mark on his cap, and it appeared that he was struck a blow on the head by some object. There was a mail hook hanging down loosely on the outside of the mail car, and if Haney was standing on a certain part of a certain mound of earth near the track, and if the defective mail hook had swung out as the train was backing past him, it could have struck him on the head at the place of injury. He could have been within the possible range of the mail hook end. He could have been struck and assaulted by a tramp or hobo. There was no evidence of a struggle or fight, but six days later his billfold with social security card and other effects but no money was found on a high board fence about a block from where he was injured and near the point where he was placed in an ambulance. His pistol had been found loose under his body but might have slipped from his pocket as he fell. It was plaintiff's theory that he was struck by the mail hook and defendant's theory that he was murdered. It was held that the choice between these theories was for the jury. The Court said:³⁶

³⁴ *Id.* at 35.

³⁵ 327 U. S. 645 (1946).

³⁶ *Id.* at 653.

It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

In *Stone v. New York, C. & St. L. R. R.*,³⁷ decided February 2, 1953, the Missouri Supreme Court was again reversed, a frequent occurrence. Plaintiff and his co-employee were pulling on a tie to remove it from under the rails. Although he protested, the foreman insisted that he pull harder, which strained his back. The command of his superior to "pull harder," the fact that usually more than two men were used, and the availability of other methods of removing ties, made negligence and causation appropriate jury issues because fair-minded men might reach different conclusions.

The liberal trend of *Tiller*, *Bailey*, *Tennant*, *Lavender*, and *Stone* has continued almost undiminished.³⁸

In *Lillie v. Thompson*³⁹ it was held that a complaint alleging that a female telegraph operator was required to work alone at night in a building in an isolated and dark portion of the railroad yards frequented by dangerous characters, without patrol protection, and which also alleged that she was criminally assaulted by a trespasser when she opened the door on the side of the building having no windows, thinking to admit a trainman, stated a jury case for failure to furnish a reasonably safe place to work.

In *Anderson v. Atchison, T. & S. F. Ry.*,⁴⁰ a complaint alleging that a conductor fell from his train in cold weather and that defendant's employees, after noting his absence, negligently delayed taking any steps to institute inquiry or rescue until an unnecessarily long time had elapsed, was held to state a cause of action to recover for the conductor's death due to exposure.

In *Wilkerson v. McCarthy*⁴¹ evidence that the plaintiff slipped and fell into an open pit while attempting to cross it on a greasy plank known as a "permanent board" and that other employees had followed the same practice was held to create

³⁷ 73 Sup. Ct. 358, *reversing*, 249 S. W. 2d 442 (Mo. Sup. Ct. 1952); the dissenting justices in this case (Frankfurter, Reed, and Jackson), long crusaders for a compensation act, announce the incredible doctrine that where equally honest and equally experienced and fair-minded state judges disagree on submissibility, the Supreme Court of the United States should abdicate its functions and declare itself in a state of suspended animation! Have these judges now decided that a jury trial on negligence is not a part and parcel of the remedy?

³⁸ *Ellis v. Union Pac. R. R.*, 329 U. S. 649 (1947); *Lillie v. Thompson*, 332 U. S. 459 (1947); *Anderson v. Atchison, T. & S. F. Ry.*, 333 U. S. 821 (1948); *Wilkerson v. McCarthy*, 336 U. S. 53 (1949); *Carter v. Atlanta & St. Andrews Bay R. R.*, 338 U. S. 430 (1949).

³⁹ 332 U. S. 459 (1947).

⁴⁰ 333 U. S. 821 (1948), *reversing*, 31 Calif. 2d 117, 187 P. 2d 729 (1947).

⁴¹ 336 U. S. 53 (1949), *reversing*, 187 P. 2d 188 (Utah, 1947).

a jury issue despite the fact that plaintiff had to walk around certain posts and chains to reach the board. The fact that a safe route was available to him did not justify withdrawing the case from the jury.

In the *Stone*, *Anderson*, and *Wilkerson* cases mentioned above, courts of last resort in Missouri, California, and Utah were reversed.

In *Wilkerson v. McCarthy*, the Court rejected as inaccurate an observation that it was for all practical purposes making a railroad an insurer of its employees. This purported observation was made by the Court of Appeals of the Seventh Circuit in *Griswold v. Gardner*⁴² where Griswold, a brakeman, was last seen alive when he left the engine of his train in the night time. A cut of seventeen cars was being shoved on an adjoining track without any light or person on the leading car. Griswold's lantern was found opposite the tank of his engine and his body across the west rail of the adjoining track six or seven car lengths away from his engine. Sustaining a recovery for the plaintiff, Judge Major in the majority opinion asserted the futility of reviewing the evidence because in effect the Supreme Court had converted the statute into a compensation law, and also stated:⁴³

Moreover, not only are these issues to be decided by the jury but its decision is unassailable. In fact, it is difficult to conceive of a case brought under this Act where a trial court would be justified in directing a verdict.

The situation of which Judge Major complains seems socially desirable. These recent landmark decisions have merely given practical application and vitality to the ringing panegyrics on jury trial voiced by the same Court in an earlier day and have only restored the fact-finding body to its proper and historical role.⁴⁴

It is important to distinguish between the elevation of the function of the jury in FELA cases and the erroneous conception that by such elevation the railroad becomes an insurer of its employees. Under the present system, it is still necessary to satisfy twelve disinterested laymen that there was some fault on the part of the railroad which contributed in whole or in part to the injury sustained. Were the defendant an insurer of its employees the requirement that the facts disclose some fault would not be present. The very confusion in terms betrays the loss of confidence in the intellect and dignity of the average citizen—a philosophy which in the totalitarian state flourishes.

Where the contesting litigants are a powerful and affluent railroad on the one hand and a frail, injured, and often poverty-stricken employee on the other hand,

⁴² 155 F. 2d 333 (7th Cir. 1946), *cert. denied*, 329 U. S. 725 (1947).

⁴³ *Id.* at 334.

⁴⁴ In *Sioux City & Pacific R. R. v. Stout*, 17 Wall. 657, 664 (U. S. 1874), the Court said: "Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

there is far more than the usual reason to insist upon the constitutional guarantee of a trial by jury. This is not to imply that the wealth and status of a powerful litigant would influence any member of the federal judiciary, but only to suggest that in this type of litigation, as in the criminal field, recent history has taught the American people the importance of eliminating, in so far as possible, all potential sources of governmental tyranny.

It is often said by detractors of the jury system that jurors find it difficult to grasp the concept of contributory negligence as a bar to recovery in personal injury actions. The rule of comparative negligence which prevails in FELA cases is a far more simple doctrine for the average juror to grasp and is, in fact, consistent with the average layman's notion of justice.

There is little abstract logic to support the thesis that the administration of justice would be improved by a resurrection of the judicial function in the determination of fact issues. One can only conclude that advocacy for this reaction is based on a concern with the cost to the railroads of compensating their injured employees.

THE LIBERALIZATION OF PROXIMATE CAUSE

More mystifying and clotted nonsense has been written on proximate cause than on the rule against perpetuities. We were recently reminded⁴⁵ that the language selected by Congress to fix liability is simple and direct and that, assuming the requirements of employment and interstate commerce are satisfied, then liability attaches for any injury or death "resulting in whole or in part from the negligence"⁴⁶ of the carrier.

The sufficiency of the evidence to establish negligence and causation is solely a matter of federal law and *Erie R. R. v. Tompkins*⁴⁷ has no application with respect to these or other questions of interpretation.⁴⁸

Implicit in the early cases, with a few exceptions to be hereafter noted, is the assumption that to recover the plaintiff must establish proximate cause or a "proximate contributory cause" as traditionally understood at common law. Must the plaintiff prove "proximate cause" in the sense of the immediate and predominant cause which produces the result directly or in the natural and normal sequence of events? Must the plaintiff prove legal cause as distinguished from philosophical cause? Is the old distinction between a condition and a cause still valid? Is a remote or indirect cause, or even a condition, sufficient to permit a jury to find liability? The answer to this latter question would today probably have to be generally in the affirmative. Competing theories of causation, like competing theories of negligence, are now for the jury.

Legal scholars have generally attempted to classify concepts of causation into six categories:

⁴⁵ *Coray v. Southern Pacific Co.*, 335 U. S. 520 (1949).

⁴⁶ 35 STAT. 55, as amended, 53 STAT. 1404, 45 U. S. C. §51.

⁴⁷ 304 U. S. 64 (1938).

⁴⁸ *Erie v. Thompson*, 337 U. S. 163 (1949).

(1) The famous maxim of Lord Bacon which tries to distinguish between proximate and remote cause.

(2) The "but-for" test, which simply means that "but for" the commission of defendant's negligence the damages would not have happened, and which would allow an endless pursuit into etiology and visit liability upon the defendant for almost any act in the chain of antecedents.

(3) The test which calls for a distinction between cause and condition.

(4) The last or nearest wrongdoer rule, which says that the culpable human actor acting last or next to the happening of the damage is liable.

(5) The natural and probable consequence rule which, according to some authorities, requires foreseeability of the harm resulting.

(6) The rule of the *Restatement of the Law of Torts* in Section 435, which is satisfied if the actor's conduct be a substantial factor in bringing about the harm, although the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred.

The Supreme Court has failed to adopt any of these tests or rules of causation, and has left the field open to give substance to the language of the statute without any arbitrary limitations. The statute itself does not use the phraseology of proximate cause, but simply provides that the carrier shall be liable for injury or death "resulting in whole or in part" from its negligence. The leading case in the Supreme Court on proximate cause which contains fairly liberal concepts and which has frequently been cited as containing the classic and authoritative exposition of the subject is the *Kellogg*⁴⁹ case decided in 1877. The Court held that causation in negligence cases was a fact question for the jury and not one of legal science for the court, but actually there was little functional scope given to this doctrine until the last decade unless, of course, the jury achieved what the court believed to be the right, sound, and sensible result. To approve or not to approve, that appears to have been the question. In the field of proximate cause, as in the field of negligence, it has seemed at times that the Court has regarded the verdict of "twelve men of the average of the community" as the ancient philosophers approached the altars of the gods—with external reverence but with inward contempt. One will find little recognition of the right of the jury to be wrong. And so the early FELA cases dealing with proximate cause evidence à rigid, narrow, and barren conceptualism.

For example, it was held in the *Lang* and *Conarty*⁵⁰ cases that the Safety Appliance Acts had been violated. It was established in each case that there was an absence of the safe drawbar and coupling apparatus required by the law, and that

⁴⁹ *Milwaukee & St. P. Ry. v. Kellogg*, 94 U. S. 469, 474 (1876) in which the Court said: "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft cited case of the squib thrown in the market place."

⁵⁰ *St. Louis & S. F. R. R. v. Conarty*, 238 U. S. 243 (1915); *Lang v. New York Cent. R. R.*, 255 U. S. 455, 461 (1921).

the injury in one case and the death in the other resulted from a collision which would not have "caused" injury or death had the statute been complied with. A collision occurred in each case between the defective car and another car or cars upon which the employee was riding. Had there been a safe and proper drawbar neither employee would have been crushed, but despite this fact it was held that in as much as no coupling was intended "the collision was not the proximate result of the defect."

It would be impossible to imagine factual situations where a more plain, obvious, and admitted violation of the law resulted in death in the one case and serious injury in the other. The facts established the resultant death and injury so clearly from the absence of a proper or safe drawbar that it is incredible that learned jurists should deprive an employee of a jury trial. But at least in neither case did the Court express any glowing tributes to that great bulwark of our Anglo-Saxon heritage, the jury trial.

The dissenting opinion (Clarke and Day) in the *Lang* case stated that it would be difficult to conceive of a case where the negligence was a more immediate and proximate cause; but in neither case was there a suggestion that a jury might properly have some function or connection with the litigation. Happily, these cases no longer express the controlling law.

In later cases, still employing the traditional concept of proximate cause, the Court rejected the requirement that the employee must be engaged in the discharge of some duty in which the safety appliance was specifically designed to furnish him protection. In the *Davis and Swinson*⁵¹ cases the rule was established that recovery could not be had if the violation of the Safety Appliance Acts was not the proximate cause of the accident but merely created an incidental condition or situation in which the accident, otherwise caused, resulted in the injury; but, on the other hand, the employee could recover if the violation of the Acts was the proximate cause of the accident resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the appliance was designed to furnish him protection. This nice and fine distinction verified the observation by Charles Dickens that appellate judges could always be relied upon to make plenty of business for themselves.

To pursue the early authorities further would be an unprofitable task, and although not specifically overruled, such cases are definitely inconsistent with later decisions and it is safe to say would not be followed today. Even in the earlier decades the Court occasionally took a more realistic, sensible, and practical approach to the problem and foreshadowed a later liberalism, especially where the Safety Appliance Acts or the Locomotive Boiler Inspection Act was involved.

In the *Campbell*⁵² case the engineer violated a train order which the jury found

⁵¹ *Davis v. Wolfe*, 263 U. S. 239 (1923); *Swinson v. Chicago, St. P., M. & O. Ry.*, 294 U. S. 529 (1935).

⁵² *Spokane & Inland Empire R. R. v. Campbell*, 241 U. S. 497, 510 (1916), *affirming*, 217 Fed. 518 (9th Cir. 1914).

was the proximate cause of the collision but the jury also found that had it not been for defective brake equipment on the electric locomotive, the accident could and would have been avoided. A general verdict was returned for the plaintiff, the jury necessarily finding that the violation of the statute with reference to train brakes also caused the collision. Sustaining a recovery for plaintiff the Supreme Court held that the violation of the Safety Appliance Acts need not be the sole, efficient cause, and that where plaintiff's contributory negligence and defendant's violation of the statute were concurring proximate causes, the action would lie. The Court of Appeals had held that the element of proximate cause was eliminated where the concurring acts of the employer and employee contribute, but the Supreme Court said, "We agree with this, except that we find it unnecessary to say the effect of the statute is wholly to eliminate the question of proximate cause."

A similar result was reached in the *Hadley*⁵³ case despite the contributory negligence of the deceased, Justice Holmes saying, "We must look at the situation as a practical unit rather than enquire into a purely logical priority."⁵⁴

The Supreme Court has usually adopted a more liberal attitude toward litigation under the Safety Appliance Acts and the Locomotive Boiler Inspection Act than toward cases based solely on negligence under the FELA. As early as the *Taylor*⁵⁵ case the Court justified the imposition of absolute liability upon the carriers, rejecting the argument of hardship, and even approving the congressional philosophy on sociological grounds.

Parenthetical reference might be made to a feature that is unfamiliar to many lawyers, even to those generally familiar with this field, that while a violation of one of the Safety Appliance Acts or the Locomotive Boiler Inspection Act or a regulation of the Interstate Commerce Commission thereunder will furnish grounds for recovery and may give rise to the cause of action, it does nothing more. Neither Act provides a remedy; neither specifies any method of recovery. A violation of either spells liability, nothing more. The remedy, if employment relationship and interstate commerce are present, is solely under the FELA; but if either of these two requirements is absent the remedy, if any, must be prescribed by state law, unless other grounds of federal jurisdiction are present.⁵⁶

⁵³ *Union Pacific R. R. v. Hadley*, 246 U. S. 330 (1918).

⁵⁴ *Id.* at 333. See also *Union Pacific R. R. v. Huxoll*, 245 U. S. 535 (1918).

⁵⁵ *St. Louis & I. M. & S. Ry. v. Taylor*, 210 U. S. 281, 295-296 (1908), wherein the Court said: "But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employee and of the public. Where an injury happens through the absence of a safe draw bar there must be hardship. Such an injury must be an irreparable misfortune to someone. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are, in the main, helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words."

⁵⁶ *Gilvary v. Cuyahoga Valley Ry.*, 292 U. S. 57 (1934); *Fairport P. & E. R. R. v. Meredith*, 292 U. S. 589 (1934); *Scott v. Chicago, R. I. & P. R. R.*, 197 F. 2d 259 (8th Cir. 1952).

Perhaps the earliest recognition by the Supreme Court of the real significance of the words "in part," except for early safety appliance cases like *Campbell* and *Huxoll*,⁵⁷ may be found in the *Hadley*⁵⁸ case decided in 1918, where a rear brakeman, killed in a rear end collision, negligently failed to go back of the standing caboose and flag the oncoming train. Other employees were clearly negligent and so was the deceased. The Supreme Court, sustaining recovery, refused to split up the charge of negligence into its constituent elements and to rule on each separately, stating that the whole may be greater than the sum of its parts. The Court said⁵⁹ the situation should be viewed "as a practical unit rather than enquire into a purely logical priority. But even if Cradit's negligence should be deemed the logical last, it would be emptying the statute of its meaning to say that his death did not 'result in part from the negligence of any of the employees' of the road."

In as much as the Supreme Court has recently avoided adherence to any proximate cause doctrine and has left the door open to give substance to the broad language of the Act in particular cases, the word "proximate" has become merely confusing, inaccurate, and obsolete, and it should be definitely deleted from the concept of causal relation under the FELA.

Illustrative of the modern trend are the *Coray*, *Carter*, and *Affolder* cases. In the *Coray*⁶⁰ case a train was proceeding on a track followed by a motor car. The decedent was operating the motor car, proceeding at a speed of 35 miles per hour. At that speed it could have been stopped within one hundred feet. Because of defective brakes, which constituted a violation of the Safety Appliance Acts, the train suddenly and unexpectedly stopped. Decedent was looking in the other direction and failed to stop his motor car, colliding with the rear end of the train and causing his death. The Utah court directed a verdict in the defendant's favor, holding that the stopping of the freight train was merely a condition and not a cause. It discussed the distinction between proximate cause in the legal sense, deemed a sufficient cause to impose liability, and in the philosophical sense, deemed insufficient. Reversing the Utah court, the Supreme Court condemned this kind of sophistry and said:⁶¹

The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose.

In *Carter*⁶² a coupling failed to make and a car loaded with pulp wood started rolling down the track. Plaintiff ran after it, climbed to the bulkhead where the brake wheel was located, and applied the hand brake, stopping the car. He looked up,

⁵⁷ *Spokane & Inland Empire R. R. v. Campbell*, 241 U. S. 497 (1916); *Union Pacific R. R. v. Huxoll*, 245 U. S. 535 (1918).

⁵⁸ *Union Pacific R. R. v. Hadley*, 246 U. S. 330 (1918); see also *Minneapolis St. P., & S. S. M. Ry. v. Goneau*, 269 U. S. 406 (1926).

⁵⁹ 246 U. S. at 333.

⁶⁰ *Coray v. Southern Pacific Co.*, 335 U. S. 520 (1949), reversing 185 P. 2d 963 (Utah 1947).

⁶¹ *Id.* at 524.

⁶² *Carter v. Atlanta & St. Andrews Bay Ry.*, 338 U. S. 430, 434 (1949).

saw the train moving towards him for a second impact, and tried to brace himself. This time the coupling was successful but plaintiff was pitched forward by the impact, causing injuries. Defendant contended that when the car came to rest "its capacity for doing harm was spent." It was contended by defendant that the second movement in which the coupling worked perfectly started a new chain of events. Rejecting this argument, the Supreme Court said, "we cannot agree that the various events were so divisible."

Again in the *Affolder*⁶³ case the Supreme Court regarded the circumstances as a practical unit and inseparably related to one another in time and space. In the *Affolder* case, as in the *Carter* case, a coupling failed to make and a cut of cars rolled down the track. Affolder ran after the moving train and in an attempt to board and stop it, he fell under a car and lost his leg. Following the *Carter* case it was held that a jury could find causal connection between the failure to couple and the injury.

While the tendency to liberalize the requirement of causal connection, and afford an ever wider scope to the ambit of jury authority has thus recently been manifested, the Supreme Court has never attempted to formalize the liberal tendency in any doctrinal sense. Perhaps the most prominent attempt to give the "new look" literary expression was in *Eglsaer v. Scandrett*.⁶⁴ The court had this factual background before it: A fireman left the cab of his standing engine and climbed onto the catwalk in order to fix the automatic bell ringer which was inoperative. He was found later on the ground on the left side of the cab unconscious. No one saw the accident. A loose rope was found adjacent to the bell ringer which plaintiff claimed was part of the bell ringer equipment. Query: Could a jury find that the violation of the Locomotive Boiler Inspection Act, *i.e.*, the failure to have all parts and appurtenances of the engine in safe and proper condition, resulted *in part* in the death of the decedent? Answering the question in the affirmative the Court of Appeals of the Seventh Circuit said the reconciliation of the old-fashioned idea of proximate cause with the new concept which now obtains is to be found in the enlarging phrase of the statute, and that:⁶⁵

It provides that if the railroad's negligence "in part" results in the injuries or death, liability arises. Under the old concept of proximate cause, that cause must have been the direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has "causal relation"—if the injury or death resulted "in part" from defendant's negligence, there is liability.

The words "in part" have enlarged the field or scope of proximate causes—in these railroad injury cases. These words suggest that there may be a plurality of causes, each of which is sufficient to permit a jury to assess liability. If a cause may create liability, even though it be but a partial cause, it would seem that such partial cause may be a producer of a later cause. For instance, the cause may be the first acting cause which

⁶³ *Affolder v. New York, C. & St. L. R. R.*, 339 U. S. 96 (1950).

⁶⁴ 151 F. 2d 562 (7th Cir. 1945).

⁶⁵ *Id.* at 565-566.

sets in motion the second cause which was the immediate, the direct cause of the accident.

Another highlight of the liberal trend on causation was *Anderson v. Baltimore & O. R. R.*,⁶⁶ which considerably preceded the *Coray*, *Carter*, *Affolder*, and *Eglsaer* cases just discussed. The deceased was a fireman on a pusher engine whose drivers began to slip and spin until finally the train had practically stalled. Anderson got off the engine, walked forward, and stooped over to look at and to tap the sand-pipes in an effort to accelerate the flow. He was instantly killed when struck by the engine of another railroad coming from the opposite direction around a curve on the adjacent track. It was contended by defendant that Anderson's own act in assuming a position of danger was the proximate cause of his death, the defect in the sanders being only a remote cause or condition. Recognizing that a jury had something to do besides tentatively fix the damages, the Court of Appeals in the Second Circuit said:⁶⁷

But the jury might reasonably find from the evidence that he had taken this position in an effort to remedy the defect and get the sand to flow before his slowly moving train should come to a complete stop, and that his conduct was a normal reaction to the stimulus of a situation created by the defendant's violation of its statutory duty.

THE MANDATORY DUTIES OF THE CARRIER

The Safety Appliance Acts⁶⁸ and the Locomotive Boiler Inspection Act⁶⁹ impose absolute and mandatory duties upon the carrier to keep certain equipment in the prescribed condition; liability of the carrier is not based upon negligence, but follows automatically from a failure of compliance, because "the duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous."⁷⁰

Before a violation of this absolute duty may be invoked to impose liability, the particular car or locomotive involved at the determinative time must be "in use." It is unlawful for the carrier "to use on its line" any locomotive engine unless equipped with the required power brake; or to "haul or permit to be hauled or used on its line" any car not equipped with the prescribed, automatic couplers; or "to use" any car not provided with secure grab irons or handholds; or "to haul, or permit to be hauled or used on its line" any car not equipped with secure sill steps and efficient handbrakes; or "to use or permit to be used on its line" any locomotive or tender unless all of its parts and appurtenances are in proper condition and safe to operate and unless they comply with the rules of the Interstate Commerce Commission.⁷¹

⁶⁶ 89 F. 2d 629 (2d Cir. 1937), *cert. denied*, 302 U. S. 696 (1937), (see also 96 F. 2d 796 (2d Cir. 1938)); see also *Chicago, M. St. P. & P. R. Co. v. Goldhammer*, 79 F. 2d 272 (8th Cir. 1935), *cert. denied*, 296 U. S. 655 (1936), where recovery was sustained for switchman who sprained his back stooping over to pick up a knuckle which had fallen to the ground from a defective coupler.

⁶⁷ 89 F. 2d at 631.

⁶⁸ 27 STAT. 531 (1893), 32 STAT. 943 (1903), 36 STAT. 298 (1910), 45 U. S. C. §1-16 (1946).

⁶⁹ 36 STAT. 913 (1911), as amended, 45 U. S. C. §22-34 (1946).

⁷⁰ *Brady v. Terminal R. Ass'n of St. Louis*, 303 U. S. 10, 15 (1938); *Myers v. Reading Co.*, 331 U. S. 477 (1947).

⁷¹ 27 STAT. 531 (1893), 45 U. S. C. §§1, 2, 4 (1946); 36 STAT. 298 (1910), 45 U. S. C. §11 (1946); 36 STAT. 913 (1911), 38 STAT. 1192 (1915), 43 STAT. 659 (1924), 45 U. S. C. §23 (1946).

When is the car or locomotive in use? In the *Brady*⁷² case a car had been hauled by the Terminal Company during switching operations and had been placed on the receiving track of the Wabash for acceptance by the latter railroad. It had been left so that the Wabash could inspect it and determine whether to accept it. An employee of the Wabash sustained injuries while inspecting the car when a grab iron came loose. It was held that this car was still "in use" by the Terminal Company before acceptance by the Wabash Company. Compare this perfectly sensible decision with the amazing result reached recently by the Court of Appeals of the Seventh Circuit in the *Lyle* and *Tisneros* cases.⁷³

In the latter case the locomotive arrived at the end of its run at 4:15 A.M. and was left in the stall at the roundhouse. The plaintiff, a fire knocker, slipped and fell on the icy steps about fifteen minutes later while he was climbing into the cab to perform his duties. He was to service the fire and prepare the engine for further service. The locomotive actually went out on an interstate run about 8:00 o'clock the same evening. It was held that the locomotive was not in use but was merely being prepared for future use and that absolute liability did not attach under the statute. It would, of course, be extremely difficult to attribute a more narrow and restrictive significance to the words "in use," or one more directly contrary to that broad, liberal, humanitarian philosophy of interpretation which, professedly, governs in the application of this legislation. One cannot even make an educated guess as to why the court held the locomotive to be in cold storage when, quite obviously, *Tisneros* was using it. Generally, however, a deserved accolade should be accorded to Congress and the courts for their insistence on recovery for injuries brought about through violations of the Safety Appliance Acts and the Boiler Inspection Act.

The *Tisneros* decision turns the clock of railroad law back a generation. It illustrates an effort to insulate the carrier from the strict liability which Congress sought to impose upon it by the Boiler Inspection Act, and negates the congressional purpose to give men engaged in the extra-hazardous occupation of railroading certain and definite protection.

If the *Tiller* case initiated the liberal decade with reference to negligence and causation under the FELA an almost similar distinction may be accorded to the *Lilly* case with reference to actions to enforce the absolute and mandatory duty now under discussion.

Theretofore it had been held that grease on a grab iron,⁷⁴ or coal upon a step leading to the locomotive cab,⁷⁵ or an ice bunker displaced by a trespasser so that it projected upon the running board,⁷⁶ or a wire wrapped around the grab irons,⁷⁷ or the failure of a fellow-employee to close a trap door in the cab over the stoker,⁷⁸ or

⁷² *Brady v. Terminal R. Ass'n of St. Louis*, *supra* note 70.

⁷³ *Tisneros v. Chicago & N. W. Ry.*, 197 F. 2d 466 (7th Cir. 1952); *Lyle v. Atchison, T. & S. F. Ry.*, 177 F. 2d 221 (7th Cir. 1949), *cert. denied*, 339 U. S. 913 (1949).

⁷⁴ *Ford v. New York, N. H. & H. R. R.*, 54 F. 2d 342 (2d Cir. 1931).

⁷⁵ *Reeves v. Chicago St. P., M. & O. R. R.*, 147 Minn. 114, 179 N. W. 689 (1920).

⁷⁶ *Slater v. Chicago, St. P., M. & O. Ry.*, 146 Minn. 390, 178 N. W. 813 (1920).

⁷⁷ *Chicago, R. I. & P. Ry., v. Benson*, 352 Ill. 195, 185 N. E. 244 (1933).

⁷⁸ *Harlan v. Wabash Ry.*, 335 Mo. 414, 73 S. W. 2d 749 (1934).

a clinker hook misplaced on the top of the tender by a fellow-servant,⁷⁹ furnished no ground for liability under either statute. These previous decisions were all disapproved by the Supreme Court in *Lilly v. Grand Trunk Western R. R.*⁸⁰ where the plaintiff slipped and fell on some ice on top of the tender between the water manhole and the fuel space, while pulling a water spout from the side of the track over the manhole to replenish the supply. His feet slipped on the ice causing him to fall to the ground. Rule 153 of the Interstate Commerce Commission required that the top of the tender behind the fuel space should be kept clean and means provided to carry off waste water. Applying the rule of liberal construction the Court held that the presence of dangerous objects or foreign matter comes within the condemnation of the statute, particularly in view of Rule 153 which has equal validity with the law and of which the courts will take judicial notice. The rule was regarded as only fortifying a result which the jury could probably have reached even in the absence of the rule.

Although the *Lilly* case held that a regulation of the Interstate Commerce Commission has the same force and effect as though prescribed in terms by the statute, it should be noted that where the carrier has strictly complied with the rule or regulation it has then discharged its full duty, and the judgment of court and jury cannot be substituted for that of the Commission. For example, where the ladder cleared the brace rod by 2½ inches and thus complied with the standard prescribed by the Interstate Commerce Commission, a brakeman who fell while descending the ladder because of a round brace rod running diagonally beneath the ladder but not violating the prescribed clearance, could not recover. Plaintiff had abandoned any claim of negligence and had elected to proceed only on the safety appliance count.⁸¹

The nature of the liability under discussion is clearly illustrated in the recent and liberal decision of *O'Donnell v. Elgin, J. & E. Ry.*⁸² This was a case where a switchman had to go between two cars that had failed to couple automatically upon impact. Presumably from the circumstantial evidence developed at the trial he was killed when two other cars broke loose from another switching movement, due to the breaking of a coupler, and collided with the standing cars between which decedent was working. Plaintiff's attorney mingled in a single count a charge of general negligence and a charge of coupler violation. On the trial he requested an instruction that the breaking of the coupler was negligence per se. In a situation of this kind courts had previously discussed liability in terms of *res ipsa loquitur*, presumptive negligence, or negligence per se. The Supreme Court swept all such issues of negligence into the discard, holding that the plaintiff was entitled to a peremptory instruction that to equip a car with a coupler which broke in the switching operation was in itself a violation of the Act which rendered the defendant liable.

⁷⁹ *Riley v. Wabash Ry.*, 328 Mo. 910, 44 S. W. 2d 136 (1931).

⁸⁰ 317 U. S. 481 (1943).

⁸¹ *Atchison, T. & S. F. Ry. v. Scarlett*, 300 U. S. 471 (1937).

⁸² 338 U. S. 384 (1949).

Nor is the protection of these statutes confined to employees alone. Passengers, highway travelers, and employees of other carriers are likewise protected and covered, except that in a non-employee case whatever defenses are available in the state to a negligence action, for example contributory negligence, may be urged by the carrier.⁸³

MODERN TRENDS AND DEVELOPMENTS

Attention might profitably be devoted to some scattered decisions indicating important developments of a liberal nature in the recent application of the Act. Advancements in scientific knowledge in the medico-legal field have enlarged the conception of accidental injuries within the Act's coverage. In *Uriè v. Thompson*⁸⁴ the Supreme Court defined the word "injury" as including an occupational disease such as silicosis resulting from silica dust in locomotive cabs, whether brought about by negligence or by defective equipment.

In *Bartkoski v. Pittsburgh & Lake Erie R. R.*⁸⁵ an offer to prove by medical testimony that a bruise to the decedent's abdomen resulting from a collision had excited a previous nonmalignant tumor into a cancer, thus causing death, was held to be proper, and evidence as to what the deceased told the doctor for purposes of treatment was held admissible.

In the *Miller*⁸⁶ case death resulted from an arterial thrombosis. The testimony established that the thrombosis was brought about by his exposure to smoke and fumes and from over-exertion. It was established that this exertion and the smoke and fumes resulted from the negligence of the defendant in maintaining electric wiring with worn and deteriorated insulation, thereby causing a short circuit and the fire. Recovery was permitted. In another case recovery was sustained for carbon monoxide poisoning where gas escaped into the cab of the engine operated by the plaintiff.⁸⁷ Again, a section worker was doing emergency work in deep water to repair a washout. He was swimming at the time and drowned, probably from cramps or a heart attack. It was held that a jury issue was presented as to whether or not the defendant had negligently failed to furnish life-saving equipment.⁸⁸

Running through the modern decisions is the logical emphasis upon the effect of the Act as an inducement to increased safety as well as a means for providing compensation to injured employees. An analogy in criminal law is available where the paramount consideration in meting out punishment is most often in enlightened courts the effect of the sentence on the community as a crime deterrent and in the reformation of the accused. No doubt statistics on work accidents in the railroad

⁸³ *Fairport, P. & E. R. R. v. Meredith*, 292 U. S. 589 (1934); *Scott v. Chicago, R. I. & P. R. R.*, 197 F. 2d 259 (8th Cir. 1952); *Hartley v. Baltimore & O. R. R.*, 194 F. 2d 560 (3d Cir. 1952); *Sherry v. Baltimore & O. R. R.*, 30 F. 2d 487 (6th Cir. 1929).

⁸⁴ 337 U. S. 163 (1949).

⁸⁵ 172 F. 2d 1007 (3rd Cir. 1949).

⁸⁶ *Miller v. Elgin, J. & E. Ry.*, 177 F. 2d 224 (7th Cir. 1949).

⁸⁷ *Shelton v. Thomson* (first appeal) 148 F. 2d 1 (7th Cir. 1945); (second appeal) 157 F. 2d 709 (7th Cir. 1946).

⁸⁸ *Williams v. Atlantic Coast Line R. R.*, 190 F. 2d 744 (5th Cir. 1951).

industry would bear out the contention that the strict enforcement of employees' rights under the FELA has had a positive and salutary effect upon the degree of care exercised in the railroad industry.

The courts have been most emphatic in insisting upon compliance with the duty to exercise reasonable care to provide the employee with a safe place to work. This is a duty the strict observance of which would almost universally tend to reduce employee accidents. Apparently for this very reason the courts have endowed this particular duty with special force and vigor and from time to time have described it as nondelegable, affirmative, and continuing, so that it "must be continuously fulfilled and positively performed."⁸⁹

Strictly as a matter of abstract law and treating the matter in a vacuum, there is no reason why this duty should possess any greater vigor or virtue or require any greater degree of care than, for example, the duty to notify and warn of dangers, but it does. And in the *Bailey*⁹⁰ case the Court referred to the duty as deeply ingrained in federal jurisprudence and as a continuing one "from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent."

An interesting facet of this duty is presented when the servant is sent to perform his work on premises owned and in the control of a third party, and is there injured by an unsafe condition created by the negligence of the employees of the third party. Illustrative of the trend in this situation is the *Ryan* case in Minnesota. Ryan, an employee of the Minnesota Transfer Railway Company, was assigned to work regularly as a freight checker in the warehouse of a grocery company. He was injured when certain bags of sugar piled in successive tiers fell upon him. The court held that although the plaintiff had worked in the grocery warehouse for years and was paid by the grocery company and subject to the orders of the foreman of the grocery company, yet in view of the fact that he had never agreed to accept the new employer, he was still an employee of the railroad company within the FELA. It was further held that the railroad company would be liable for the consequences of any negligent piling of the sacks of sugar by the grocery employees to the same extent as if the work had been done by the employees of the railroad company.⁹¹ This is imputed negligence.

Recently the Supreme Court has clarified some of the problems formerly troublesome, affecting the validity of releases in FELA cases. In *Callen v. Pennsylv.*

⁸⁹ *Porter v. Terminal R. Ass'n of St. Louis*, 327 Ill. App. 645, 65 N. E. 2d 31, 33 (1946).

⁹⁰ *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 353 (1943).

⁹¹ *Ryan v. Twin City Wholesale Grocer Co. Ry.*, 210 Minn. 21, 297 N. W. 705 (1941); see also *Porter v. Terminal R. Ass'n of St. Louis*, 327 Ill. App. 645, 65 N. E. 2d 31 (1946); *Terminal R. Ass'n of St. Louis v. Fitzjohn*, 165 F. 2d 473 (8th Cir. 1948). The *Ryan* case imputes the negligence of the third party to the railroad company, and *Porter* and *Fitzjohn* tend in the same direction. Other cases do not go quite so far. Although *Fitzjohn* was predicated on real rather than imputed negligence, the court said (165 F. 2d at 476-477): "Since plaintiff was an employee of defendant at the time of his injury the fact that the premises where plaintiff was sent to work did not belong to and were not under the control of defendant did not absolve defendant from liability for their unsafe condition." *Contra*: *Kaminski v. Chicago River & Indiana R. R.*, 200 F. 2d 1 (7th Cir. 1953).

vania R. R.,⁹² the plaintiff contended that the burden to show fraud or mutual mistake should not be on the employee but that the party who pleads the release contract as a defense should prove the absence of those grounds, establishing affirmatively that the contract was not tainted by fraud or impaired by mutual mistake. The majority of the Court in an opinion by Mr. Justice Jackson described the argument as persuasive, stating that the difference or inequality of bargaining power and the superior facilities of the carrier might well justify Congress in changing the law, but held that releases of railroad employees stand on the same basis as others, saying:

One who attacks a settlement must bear the burden of showing that the settlement he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted.

The case of *Dice v. Akron, Canton & Youngstown R. R.*⁹³ has a revolutionary aspect. This case was tried in a state court in Ohio where the validity of a release pleaded as a defense must be determined by the trial judge on the chancery or equity side of the calendar. In the state courts of Ohio, as in a few other states, the old, traditional division between law and equity prevails, and factual issues involving fraud and mistake are tried and determined by the court and not by the jury. The Ohio Supreme Court held that the method of determining the validity of a release was procedural and having elected to sue in an Ohio state court plaintiff was required to try this issue according to Ohio procedure.

The Supreme Court of the United States held that the question was one of federal rather than state law; that in FELA cases the rule must be uniform and national; that a jury trial is part and parcel of the remedy afforded workers under the FELA; and that factual issues with respect to the validity of the release must be submitted to a jury irrespective of local rules of Ohio procedure in other cases.

Until the *Scarborough* case^{93a} (three times before the Court of Appeals) it was orthodox doctrine that the statute of limitations in an FELA case could not be tolled by fraud or misrepresentation. The third and last opinion holds that a misstatement, although innocently made by the claim agent, that plaintiff had three years after reaching his majority to institute suit, would toll the statute where it was relied upon to his prejudice. It was unnecessary for plaintiff to establish fraud in the

⁹² 332 U. S. 625, 630 (1948). Four dissenting justices (Black, Douglas, Rutledge, and Murphy) contended that FELA releases should be governed by the rule which applies to releases by seamen in admiralty.

⁹³ 342 U. S. 359 (1952). The dissenting opinion (of Mr. Justice Frankfurter, joined by Justices Reed, Jackson, and Burton) was based principally on the ground that the Seventh Amendment to the Constitution guaranteeing jury trial has no application to the states. In as much as the general rule to set aside a release requires evidence that is clear, unequivocal, and convincing, Mr. Justice Frankfurter's statement is interesting (p. 369): "Such proof of fraud need be only by a preponderance of relevant evidence." For a case holding that only a preponderance is necessary, see *Purvis v. Pennsylvania R. R.*, 198 F. 2d 631 (3d Cir. 1952).

^{93a} *Scarborough v. Atlantic Coast Line R. R.*, 178 F. 2d 253 (4th Cir. 1949) (first appeal), *cert. denied*, 339 U. S. 919 (1950); 190 F. 2d 935 (4th Cir. 1950) (second appeal); 202 F. 2d 84 (4th Cir. 1953) (third appeal).

classic sense. A misstatement, made innocently, and for the purpose of inducing plaintiff to delay bringing suit, was sufficient and the plaintiff need establish the misstatement by a preponderance of the evidence rather than by proof that is clear and convincing. A decade ago this would have been heresy.

In the miscellany to which this section is devoted, three other decisions of the Supreme Court might well be summarized. In *Brown v. Western Railway of Alabama*⁹⁴ it was held that in determining whether a complaint stated a cause of action under the FELA, local rules of pleading, even though procedural, were unimportant and should be disregarded where they impose unnecessary burdens on the federal right. In *Boyd v. Grand Trunk Western R. R.*⁹⁵ a covenant or agreement limiting venue of an FELA case to a particular county or district was condemned as void because in violation of Section 5 of this Act prohibiting any contract enabling a carrier to exempt itself from any liability under the Act. However, an FELA case in a federal court may, for the convenience of the parties and witnesses and in the interest of justice, be transferred to any other district or division where it might have been brought, as provided in Section 1404(a) of the Judicial Code.⁹⁶

While in this article references have occasionally been made to "liberal trends" in the past decade, the term "trends" in so far as it connotes a continuing single direction is perhaps inaccurate. The currents of judicial interpretation, and even legislation, in the field of work accidents in the railroad industry reflect the conflicting economic interests and varying goals of social desirability. As this article goes to press, two pronouncements of the Supreme Court present omens of a possible contracture of the scope of the FELA.

On January 12, 1953 in *O'Rourke v. Pennsylvania R. R.*⁹⁷ it was held that railroad employees, even though they were performing their usual duties as operating railroad men, were not to be afforded the protection of the Act where they were performing their duties on car floats in navigable waters at the time they sustained injury. A railroad brakeman releasing a brake on a railroad car is thus not a railroad brakeman, nor a seaman under the Jones Act,⁹⁸ but by some sort of judicial hocus-pocus becomes a stevedore under the Longshoremen's and Harbor Workers' Compensation Act.⁹⁹ The millennium for the exercise of legalistic legerdemain, the supreme opportunity for the employment of juridical magic, will be represented when the Court is confronted with an accident to a railroad brakeman releasing a brake on a railroad car which is partly on a car float and partly on land. The opinions of both the majority of five justices and the minority of four justices (Minton, Vinson, Clark, and Black) in the *O'Rourke* case leave open the question of whether the Court will consider the determinative issue to be (a) the percentage of the railroad car which is over land as against the percentage which is over the water, (b) whether the brake on which the railroad brakeman was work-

⁹⁴ 338 U. S. 294 (1949).

⁹⁵ 338 U. S. 263 (1949).

⁹⁶ *Ex parte Collett*, 337 U. S. 55 (1949).

⁹⁷ 73 Sup. Ct. 302.

⁹⁸ 38 STAT. 1185 (1915), as amended, 46 U. S. C. §688 (1946).

⁹⁹ 44 STAT. 1424 (1927), as amended, 33 U. S. C. §§901-950 *et. seq.* (1946).

ing was over land or over water, or (c) whether the brakeman was unfortunate enough to fall on the car float as a result of his injuries rather than on dry land. When this case presents itself to the Supreme Court, there will be something new under the sun! Regardless of how the question is resolved jurisprudence is not likely to be enriched, and the author is personally grateful that the goodly number of cases which he has brought under the FELA for accidents to railroad men on trains which were crossing bridges over navigable streams came before the majority opinion in the *O'Rourke* case made the entire subject completely obscure and unintelligible.

On January 19, 1953 the Supreme Court in *South Buffalo Ry. v. Ahern*¹⁰⁰ rendered a decision which, while sound and just in itself, contains language which appears capable of an interpretation that it is possible for the parties to waive the benefits of the FELA and elect to take compensation. Safeguards and caution will be needed to prevent an extension of this principle of waiver. Otherwise, if employer and employee may effectively make such a waiver there will be a collision with the *Boyd* case and with the declaration of Section 5 (45 U. S. C. §55) of the FELA, which states in precise terms that "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."

CONCLUSION

Admittedly the accident problem in the railroad industry is an awful and tragic one. It would be fantastic to expect perfect justice in fixing liability and in assessing damages for the injuries which these employees suffer. The true jury system, with its potentialities for occasional errors in findings of fact, seems more appropriate and more equitable than either the overly legalistic approach of judges (frequently jurors in black robes) or the niggardly handouts of the compensation system.

The judicial crusaders for the compensation principle, possessed with a zeal not according to knowledge, seem wholly unaware that the adoption of any such system now in effect, particularly the transfer of railroad victims to the various state compensation systems, will only load the taxpayers with additional bureaucracy and deprive cripples and widows of adequate awards, saving money perhaps only for the railroads.¹⁰¹

The present system with all its faults almost uniformly results in a satisfactory award to the claimant. Experience has demonstrated that only a minority of cases result in a failure of compensation. Confirmation may be found in the writer's experience, which covers some seventeen years and in excess of a thousand such cases, resulting in only one where there was no award whatsoever for the claimant. Recoveries by way of settlement or trial for such an injury as the loss of a leg

¹⁰⁰ *South Buffalo Ry. v. Ahern*, 73 Sup. Ct. 340.

¹⁰¹ See Richter and Forer, *Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers*, 36 CORNELL L. Q. 203 (1952).

have run from \$20,000 to \$82,500, depending on the circumstances, as compared with an average compensation payment of approximately \$10,000 for a similar injury under the various state workmen's compensation acts.

The amounts now recovered under the present system are meaningful and serve an economic purpose. After deducting attorney's fees and expenses, which usually run from 25 per cent to $33\frac{1}{3}$ per cent of the recovery, there are sufficient funds remaining to compensate the injured claimant for the loss or impairment of his earning capacity and to enable him to rehabilitate himself as a useful member of society.

It will be time enough to consider the adoption of a compensation system when one is proposed that will better accomplish the social, economic and humane objectives now effectuated by the FELA. None is on the horizon.